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Target Resources Sdn Bhd v THP Bina Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(C)(A)-664–03 OF 2018
TENGKU MAIMUN, MARY LIM AND HASNAH HASHIM JJCA
1 APRIL 2019

C

Contract — Performance bond — Injunction — Call of performance bond pursuant to contract — Allegation of unconscionability — Whether demand on bank guarantee unconscionable — Whether demand made after expiry of bank guarantee — Whether there were serious issues to be tried

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This was an appeal against the decision of the learned High Court judge who dismissed the appellant's originating summons to restrain the respondent from receiving monies pursuant to the call of the performance bond pursuant to a contract. There was a delay and slow progress of the construction works which resulted in the respondent issuing a notice of default to the appellant requiring the appellant to remedy the problem wherein the appellant failed. The respondent had terminated the contract eight months prior to the completion date. The dispute between the parties with regard to the termination of the contract was pending determination in an arbitration. Despite the termination of the contract, at the request of the respondent, the appellant renewed the first bank guarantee. The respondent made a demand for the payment of a sum of monies under the first bank guarantee for the alleged failure of the appellant to renew and extend the first bank guarantee within the time as stipulated, this fact was not conveyed to the appellant who only subsequently came to know through Malayan Banking Bhd ('MBB'). The appellant contended that the demand made by the respondent on the bank guarantee was unconscionable, unjustifiable and unlawful; lacking in bona fide and unenforceable against the appellant. The respondent however was prepared to grant an indulgence by holding back the release if the bank guarantee was renewed by 29 December 2017. The respondent contended that MBB did not comply with the respondent's request as the bank guarantee was not on the same terms as the first bank guarantee.

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Held, allowing the appeal with RM5,000 costs subject to the payment of allocator:

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(1) The allegation of unconscionability was fact sensitive and having considered the material facts of this appeal, the court was satisfied that

there was sufficient manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained off, and not a mere bare assertion (see para 27).

(2) The respondent had made the demand after the appellant had extended the bank guarantee clearly illustrated the lack of bona fide on the part of the respondent. The call on bank guarantee when the respondent had given indulgence to the appellant could be construed as unconscionable. Any discussions or negotiations on the terms of the bank guarantee should necessarily involved the appellant. The lack of notice to the appellant called into question the conduct and the conscionability of the call by the respondent (see para 33).

(3) The demand made by the respondent was on 29 January 2018 under the original bank guarantee was well outside the expiry of the guarantee which had lapsed on 6 December 2017. The first bank guarantee had lapsed when the call was made on 29 January 2018 and as such the sum guaranteed ought not to have been paid out to the respondent. The learned High Court judge erred in failing to consider the existence of the extended bank guarantee and the material facts relating to the call on the bank guarantee. There were serious issues to be tried and the balance of convenience lay in favour of granting the reliefs sought (see paras 35–36).

[Bahasa Malaysia summary

Ini merupakan satu rayuan terhadap keputusan hakim Mahkamah Tinggi yang telah mengetepikan saman pemula perayu untuk menghalang responden daripada menerima wang selaras dengan pemanggilan semula bon pelaksanaan selaras dengan satu kontrak. Wujud satu penangguhan dan perkembangan perlahan kerja-kerja kontrak yang menyebabkan responden mengeluarkan notis ingkar kepada perayu untuk meremidi masalah tersebut yang mana perayu telah gagal. Responden telah membatalkan kontrak tersebut lapan bulan sebelum tarikh penyelesaian. Perbalahan antara pihak-pihak berkaitan dengan pembatalan kontrak tersebut adalah menantikan keputusan timbang tara. Tidak mengambil kira pembatalan kontrak tersebut, atas permintaan responden, perayu telah memperbaharui jaminan bank pertama. Responden telah membuat satu tuntutan untuk pembayaran sejumlah wang di bawah jaminan bank pertama dalam tempoh sepertimana diperincikan, fakta ini tidak dimaklumkan kepada perayu yang hanya mendapat tahu melalui Malayan Banking Bhd ('MBB'). Perayu menegaskan bahawa tuntutan yang dibuat oleh responden berkaitan dengan jaminan bank tersebut adalah tidak berpatutan, tiada justifikasi dan tidak sah di sisi undang-undang; tiada bona fide dan tidak boleh dikuatkuasakan terhadap perayu. Responden pula bersedia untuk menggantung pengeluaran tersebut sekiranya jaminan bank diperbaharui pada atau sebelum 29 Disember 2017. Responden menegaskan bahawa MBB tidak patuh dengan permohonan responden atas sebab jaminan bank tidak berdasarkan terma yang sama dengan jaminan bank yang pertama.

Diputuskan, membenarkan rayuan dengan kos RM5,000 tertakluk kepada pembayaran alokatur:

(1) Dakwaan ketidakpatutan adalah sensitif kepada fakta dan setelah mengambilkira fakta material rayuan ini, mahkamah bersetuju bahawa wujud keterangan jelas dan kuat yang mencukupi berkenaan dengan pelakuan tidak patut yang diadukan dan bukannya satu pengataan semata-mata (lihat perenggan 27).

(2) Responden telah membuat tuntutan tersebut selepas perayu telah melanjutkan jaminan bank dengan jelas menunjukan ketiadaan bona fide pada pihak responden. Pemanggilan jaminan bank setelah responden memberikan kelapangan kepada perayu boleh dikatakan sebagai tidak patut. Apa-apa perbincangan atau rundingan berkenaan dengant terma jaminan bank sepatutnya melibatkan perayu. Ketiadaan notis kepada perayu menimbulkan persoalan terhadap perlakuan dan kepatutan penggilan tersebut oleh responden (lihat perenggan 33).

(3) Tuntutan yang dibuat oleh responden pada 29 Januari 2018 dibawah jaminan bank asal adalah diluar tempoh jaminan tersebut yang telah luput pada 6 Disember 2017. Jaminan bank pertama telah luput apabila panggilan dibuat pada 29 Januari 2018 oleh itu, jumlah yang dijamin sepatutnya tidak dibayar kepada responden. Hakim mahkamah tinggi terkhilaf apabila gagal untuk menimbangkan kewujudan pelanjutan jaminan bank dan fakta-fakta material berkaitan dengan pemanggilan jaminan bank tersebut. Wujud isu-isu untuk dibicarakan yang serious dan imbangan kemudahan berpihak kepada memberikan relif yang dipohon [lihat perenggan 35–36).]

Notes

For cases on injunction, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 6731–6733.

Cases referred to

Bocotra Construction Pte Ltd & Ors v Attorney General (No 2) [1995] 2 SLR 733, CA (refd)

GHL Pte Ltd v Unitrack Building Construction Pte Ltd & Anor [1999] 4 SLR 604; [1999] SGCA 60, CA (refd)

Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd [2011] 7 CLJ 442, CA (refd)

Malaysian Refining Company Sdn Bhd v Sumatec Engineering and Construction Sdn Bhd [2011] 7 CLJ 21, CA (refd)

Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316; [2007] 3 CLJ 295, CA (refd)

Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1; [2012] 3 CLJ 401, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69(4)

Appeal from: Originating Summons No BA-24C-11–02 of 2018 (High Court, Shah Alam)

Foo Joon Liang (Rohan Arasoo and Teoh Yen Tee with him) (Harold & Lam Partnership) for the appellant.

Tharminder Singh (Aravind Kumar with him) (Izral Partnership) for the respondent.

Hasnah Hashim J:

[1] The appeal before us was against the decision of the learned High Court judge in the Shah Alam High Court dismissing the appellant's originating summons ('OS') to restrain the respondent from receiving monies pursuant to the call of the performance bond of RM12,625,000. We had, after perusing the records of appeal and after considering the written and oral submissions of learned counsel for the appellant and the respondent, unanimously allowed the appeal with costs. The order of the High Court was set aside. We further ordered that the deposit be refunded. We now give our reasons for allowing the appeal.

[2] For the purpose of this judgment, the parties will be referred to as they were in the High Court.

BACKGROUND FACTS

[3] In encl 1 of the OS, the plaintiff sought the following:

(1) Suatu deklarasi bahawa sebarang tuntutan yang dibuat oleh Defendan berkaitan dengan Jaminan Bank (Rujukan No: 99060BGP6001807) bertarikh 17.2.2015 untuk jumlah sebanyak RM12,625,000.00 ('Jaminan Bank') adalah tidak dijustifikasikan, tidak wajar, kekurangan bona fide dan tidak boleh dikuatkuasakan terhadap Plaintif;

(2) Suatu deklarasi bahawa tuntutan yang dibuat oleh Defendan berkenaan dengan Jaminan Bank adalah tidak sah, menyalahi undang-undang dan tidak bolehi dikuatkuasakan terhadap Plaintif;

(3) Suatu perintah untuk menghalang Defendan, samada dirinya sendiri, melalui pengarah-pengarah, kakitangan-kakitangan, pekerja-pekerja, wakil-wakil dan/atau ejen-ejen ataupun sesiapa sahaja, daripada menerima hasil sebarang tuntutan yang dibuat di bawah Jaminan Bank atau sekiranya di mana hasil tersebut telah diterima, suatu perintah menghalang Defendan daripada memindahkan, menggunakan atau berurusan dengan apa jua cara dengan hasil tersebut, sehingga

penyelesaian akhir pertikaian-pertikaian antara Plaintif dan Defendan berkaitan dengan dan/atau menimbul di bawah Kontrak melalui Surat Penerimaan Tender bertarikh 28.9.2013 dengan cara timbang tara atau litigasi, atau apa-apa tempoh lain yang dianggap patut dan sesuai oleh Mahkamah Yang Mulia ini;

(4) Suatu perintah menghalang Defendan daripada membuat sebarang panggilan atau tuntutan yang selanjutnya terhadap Jaminan Bank;

(5) Kos-kos ditanggung oleh Defendan; dan

(6) Relif-relif yang lain dan selanjutnya yang dianggap sesuai oleh Mahkamah Yang Mulia ini.

[4] The plaintiff was appointed by the defendant as the contractor to carry out works at the main building for a project described as 'Cadangan Membina dan Menyiapkan Kompleks Tabung Haji Yang Terdiri Daripada Pusat Operasi Haji 2 Tingkat, Hotel Tabung Haji 9 Tingkat (333 Bilik), Astaka, Bangunan Tempat Letak Kereta 3 Tingkat (Termasuk Dua Kolam Renang Dan Tennis Court Di Atas Bumbung) Di Atas Lot PT 76, Bandar Lapangan Terbang Antarabangsa Sepang, Mukim Labu, Daerah Sepang, Selangor Darul Ehsan' ('the project'). The contract sum of the project is RM252,500,000. The parties entered into an agreement based on the Jabatan Kerja Raya (JKR) Form of Contract, that is, Form 203A (Revised 2007) ('the contract'). The completion period is 28 months and the date of completion of the project is 6 February 2016.

[5] Pursuant to cl 13.1(a) of the contract, the plaintiff provided a performance bond in the form of a bank guarantee dated 17 February 2015 in the sum of RM 12,625,000 issued by Malayan Banking Bhd ('MBB') in favour of the defendant as security for the performance of the works under the contract ('the first bank guarantee'). The validity of the first bank guarantee was for a period commencing 7 October 2013–6 December 2017.

[6] There was a delay and slow progress of the construction works of the project which resulted in the defendant issuing a notice of default to the plaintiff on 14 May 2015 requiring the plaintiff to remedy the problem within 14 days. The plaintiff failed to remedy the problem and, on 19 June 2015 the defendant terminated the contract pursuant to cl 51.1(b) of the contract, eight months prior to the agreed completion date. The dispute between the parties with regards to the termination of the contract is pending determination in an arbitration. Despite the termination of the contract, on the request of the defendant, the plaintiff renewed the first bank guarantee extending it to 6 December 2018. On 29 January 2018, the defendant made a demand for the payment of RM12,625,000 under the first bank guarantee. The basis of the demand was the alleged failure of the plaintiff to renew and extend the first

bank guarantee within the time as stipulated. This was however, not conveyed to the plaintiff. The plaintiff subsequently came to know of the demand and the basis of the demand through MBB. Based on the demand by the defendant, MBB notified the plaintiff on 13 February 2018 that it will honour the demand by debiting the sum of RM12,625,000.

[7] In a nutshell, learned counsel for the plaintiff argued that the demand made by the defendant on the bank guarantee was unconscionable, unjustifiable and unlawful; lacking in bona fide and unenforceable against the plaintiff. Learned counsel for the plaintiff submitted that:

(a) the termination of the contract was unlawful and premature;

(b) the defendant failed to issue payments based on the progress claims;

(c) the plaintiff has valid claim for losses and expenses for a period from 15 September 2015–31 October 2015 for RM2,120,359.92; and

(d) the defendant has an obligation to return the retaining sum of RM3,442,364.97.

[8] The defendant was however, prepared to grant an indulgence by holding back the release of the guaranteed sum if the bank guarantee was renewed by 29 December 2017. The defendant contended that MBB did not comply with the defendant's request as the bank guarantee was not on the same terms as the first bank guarantee. However, the plaintiff were unaware of the defendant's concerns as no notice was given to them.

[9] On 29 January 2018, two and a half years after the determination of the contract, the defendant made a demand that MBB honour the first bank guarantee and release the guaranteed sum. The reason given for the demand was the failure of the plaintiff to renew the first bank guarantee within the time stipulated.

[10] The plaintiff filed an ex parte application on 15 February 2018 for an interim injunction to restrain the defendant from:

(a) receiving the proceeds under the bank guarantee; and

(b) making any further demand on the bank guarantee pending the arbitration or litigation of the disputes between the parties.

[11] The ex parte order was granted. However, on 21 March 2018 the High Court judge dismissed the OS and the inter partes injunction application with costs of RM2,000 each.

FINDINGS OF THE HIGH COURT

[12] The findings of the learned judge can be summarised as follows:

(a) the demand made by the defendant was valid and there is no issue of unconscionability;

(b) whether there was a valid demand on the bank guarantee was a matter governed by the contract for the guarantee between the defendant and MBB;

(c) MBB had confirmed that the bank guarantee demand was valid;

(d) the court will not interfere on a call on an on-demand guarantee unless rigorous requirements are met;

(e) the issues between the plaintiff and the defendant were governed by the contract to be determined in the arbitration proceedings;

(f) no evidence of unconscionability relevant to whether the bank guarantee can be restrained; and

(g) the issue that parties have reached an agreement, the documents referred was 'without prejudice' communication between the parties and ought to be disregarded.

SUBMISSION OF PARTIES

[13] Learned counsel for the plaintiff submitted before us that the demand on the bank guarantee is unconscionable for the following reasons:

(a) the basis of the demand that the bank guarantee was not renewed is untrue. The plaintiff had taken steps to renew the bank guarantee on the terms as requested by the defendant; and

(b) the defendant had agreed to the renewal of the bank guarantee in order to place the plaintiff in a position of security.

[14] He further argued that the appeal is not academic as the court has ample powers pursuant to s 69(4) of the Courts of Judicature Act 1964 reversing the orders of the High Court and to restore status quo ante. In support learned counsel relied on the case of *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316; [2007] 3 CLJ 295 where it was held that this court has ample power, upon reversing orders of the judge, to restore the status quo ante that prevailed immediately prior to the presentation of the petition. The monies received ought to be remitted to the bank and on that basis the appeal is not academic.

[15] It is incontrovertible that the bank guarantee was in fact renewed on the

terms as imposed by the defendant. The first bank guarantee issued as security is thus superseded by the extended bank guarantee.

[16] It was further contended by learned counsel for the plaintiff that the defendant had agreed that it will not call on the first bank guarantee if it is extended.

[17] In response learned counsel for the defendant submitted that the appeal has been rendered academic since the relief sought by the plaintiff is to restrain the receipt and/or utilising the proceeds under the bank guarantee. The proceeds under the bank guarantee has been released to the defendant on 22 March 2018 and the plaintiff did not pursue any interim relief pending this instant appeal.

[18] It was further argued that the plaintiff had not provided any undertaking as to damages in respect of the injunctive relief sought. Furthermore, there is no evidence that the plaintiff is in a position to make good of any losses suffered, if any, by the defendant.

[19] It is the submission of learned counsel for the defendant that the learned High Court judge had, based on the facts and circumstances of the case, correctly exercised his discretion to refuse the injunctive relief sought.

OUR DECISION

[20] The legal basis of the judge's analysis was challenged in two respects. Firstly, it was argued by learned counsel for the plaintiff that the demand was unconscionable as the bank guarantee had been extended by agreement of the parties. The second argument was that the demand was made after the expiry of the bank guarantee.

[21] The basis of the demand by the defendant was that the plaintiff did not renew the first bank guarantee and that when it was renewed it was not based on the terms as required by the defendant. The renewed bank guarantee (Serial No 939302) was stamped on 13 December 2017. The bank guarantee (Serial No 939281) that was renewed earlier and produced by the defendant contained terms different from the terms required by the defendant was stamped much earlier, that is, on 7 December 2017. This bank guarantee bearing Serial No 939281 has been superseded by the renewed bank guarantee (Serial No 939302). The basis of the demand was the failure of the plaintiff to provide a bank guarantee on the terms and by the specific date as required by the defendant:

> By our letter dated *November 27, 2017* we had formally demanded the payment to

us Beneficiary of the abovementioned Guarantee, the sum of Ringgit Malaysia: *Twelve Million Six Hundred And Twenty Five Thousand (RM12,625,000.00)* only in accordance with Clause 1 of the said Guarantee arising from the breach by the Contractor of its obligations under the Contract, unless the Guarantee was renewed on or by November 28, 2017 on the same terms for a period of one year. Our timeline was not met by your Bank.

By your letter dated December 27, 2017 we had indicated our preparedness to grant indulgence to your Bank to withhold payment to our Company of the guaranteed sum provided that a new Bank Guarantee is to be issued by your Bank to our Company specifically setting out that it is a renewal of the original Guarantee and the new Bank guarantee shall remain in force from October 27, 2013 until December 6, 2018.

(see p 261 CBD) (Emphasis added.)

[22] The principle of unconscionable conduct was discussed by this court in case of *Malaysian Refining Company Sdn Bhd v Sumatec Engineering and Construction Sdn Bhd* [2011] 7 CLJ 21:

[24] On the issue of 'unconscionability' as raised by the respondent, even assuming the principle is to be applied and adopted in the present case, it must clearly be established and proven by evidence in the circumstances of the case. As in the case of fraud, to establish 'unconscionability' there must be placed before the court manifest or strong evidence of source degree in respect of the alleged unconscionable conduct complained of, not a bare assertion. Hence, the respondent has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of 'unconscionability' which would basically mean establishing a strong prima facie case. In other words, the respondent has to place sufficient evidence before the court so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of 'unconscionability' being committed by the beneficiary (the appellant) has been established to an extent sufficient for the court to be minded to order injunction sought. This additional ground of 'unconscionability' should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man.

[25] The principle concerning 'unconscionability' was initially propounded by Lord Denning in the case of *Lloyds Bank Ltd v Bundy* [1975] QB 326 where it was held that unconscionable transaction between parties may be set aside by the court of equity. This 'unconscionable' category is said to extend to all cases where unfair advantage has been gained by an unconscientious use of power by a stronger party against a weaker (see also *Halsbury's Law of England*, (3rd Ed, Vol 17) [1956] at p 682).

[26] On an application for relief against unconscionable conduct, the court looks to the conduct of the party attempting to enforce, or retain benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so (see: *Commercial Bank of Australia Ltd v Amadio and Another* [1983] 46 ALR 402).

[23] The Federal Court (see *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1; [2012] 3 CLJ 401) affirmed the decision of the Court of Appeal in *Sumatec*. Abdul Hamid Embong FCJ said as follows (at p 15):

> [33] It would seem from the modern authorities we have read, that in the case of on demand letters of guarantee or performance bonds the courts are now more willing to look beyond the fraud exception and consider unconscionability as a separate and independent ground to allow for a restraining order on the beneficiary.
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> [34] The rationale for embracing this equitable exception can be seen from this passage of the Australian High Court decision of *Stern v McArthur* (1988) 165 CLR 489, where it was said:
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> > The general underlying notion is that which has long been identified as underlying much of equity's traditional jurisdiction to grant relief against unconscientious conduct, namely, that a person should not be permitted to use or insist upon his legal rights to take advantage of another's special vulnerability or misadventure for the unjust enrichment of himself ...

[24] The Court of Appeal of Singapore affirmed the principle that unconscionability on the part of the beneficiary in calling or demanding for payment on a performance bond is a separate and distinct ground apart from fraud for seeking injunctive relief (see *Bocotra Construction Pte Ltd & Ors v Attorney General (No 2)* [1995] 2 SLR 733 and *GHL Pte Ltd v Unitrack Building Construction Pte Ltd & Anor* [1999] 4 SLR 604; [1999] SGCA 60).

[25] Justice Zainun Ali, JCA (as she then was) in *Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd* [2011] 7 CLJ 442 at p 459 explained:

> In my view the principle underlying the unconscionability doctrine is the prevention of oppression and unfair conduct; and because the determination of unconscionability is fact specific, courts must consider such a claim on a case by case basis and assess the totality of the circumstances.

[26] The Court of Appeal through the judgment of Ramly Ali JCA (as he then was) in *Kejuruteraan Bintai Kindenko* at p 459 explained with clarity the principle of unconscionability as follows:

> [47] It is not possible to define 'unconscionability' other than to give some very broad indications such as lack of bone fides. What kind of situation would constitute 'unconscionable conduct' would have to depend on the facts of each case. This is a question which the court has to consider on each occasion where its jurisdiction is invoked.
>
> There is no pre-determined categorisation (see *Dauphin Offshore Engineering and Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al-Nahyan* [2000] 1 SLR (R) 117; and *Shanghai Electric Group Co Ltd v PT Merak*

Energi Indonesia & Anor [2010] 2 SLR 329).

[48] Based on the above considerations, we are of the view that there is no simple formula that would enable a court to ascertain whether a party had acted unconscionably in making a call or demand on an 'on demand' performance bond. In the final analysis, whether or not 'unconscionability' has been made out is largely dependent on the facts of each case. In every case where 'unconscionability' is made out, there would always be an element of unfairness or some form of conduct which appears to be performed in bad faith'.

[27] The allegation of unconscionability is fact sensitive and having considered the material facts of this appeal we are satisfied that there is sufficient manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, and not a mere bare assertion. The defendant vide a letter dated 27 November 2017 informed MBB that '... unless the Bank Guarantee is renewed on or by November 28, 2017 on the same terms for a further period of one year and expiring on December 6, 2018 and a stamped copy of the same is hand delivered to us on the same day ...' a demand will be made for the payment of the guaranteed sum (see p 246 CBD):

TAKE NOTICE THAT *unless this Guarantee is renewed on or by November 28,2017 on the same terms for a further period of one year and expiring on December 6, 2018 and a stamped copy of the same is hand delivered to us on the same day, we do hereby demand payment to us* as Beneficiary the sum of Ringgit Malaysia Twelve Million And Six Hundred and Twenty Five Thousand (RM12,625,000.00) only in accordance with Clause 1 of the said Guarantee arising from the breach by the Contractor of its obligations under the Contract which resulted in the termination of the Contract referred to in Recital 1 of the said Guarantee ... (Emphasis added).

[28] Learned counsel for the plaintiff contended that numerous discussions were held between the parties and at a site close out meeting held on 25 August 2015, after the termination of the contract, the defendant had agreed to release the guaranteed sum to the plaintiff (see para 18 affidavit in support). On 28 November 2017 the plaintiff with the agreement of the defendant submitted an application to MBB to renew the bank guarantee. The defendant had agreed not to make any demand if the bank guarantee is renewed and extended to 6 December 2018. The plaintiff was unaware that the defendant by the letter dated 27 November 2017 had in fact notified MBB that the renewed bank guarantee did not conform with the defendant's requirement. Neither was the plaintiff given notice that the deadline was 28 November 2017 for the renewed bank guarantee to be procured by the plaintiff.

[29] Subsequently, one month later on 27 December 2017 the defendant informed MBB of its preparedness to grant indulgence to withhold payment of the guaranteed sum provided that a new bank guarantee will be issued by MBB specifically stating that it is a renewal of the original guarantee and the new

bank guarantee shall remain in force from October 2017–6 December 2018 (see pp 259–260 CBD). Again this letter was not copied to the plaintiff:

> We are prepared to grant indulgence to your Bank to withhold payment to our Company on the guaranteed sum under the First Bank Guarantee and the Guarantee shall be irrevocable and remain in force and effect from October 7, 2013 until December 6, 2018.

[30] This was followed by another letter dated 29 January 2018 where the defendant formally demanded the payment of the guaranteed sum in accordance with cl 1 of the bank guarantee arising from the breach by the plaintiff of its obligations under contract, in particular, failing to renew the bank guarantee on the same terms for a period of one year and thus not meeting the time line as set by the defendant.

[31] Learned counsel for the plaintiff contended that the renewed bank guarantee bearing Serial No 939281 produced by the defendant stamped on 7 December 2017 was superseded by the other renewed bank guarantee stamped on 13 December 2017. This bank guarantee was renewed on the terms as required by the defendant.

[32] The defendant through its letter dated 27 November 2017 had made it clear that it was prepared to grant indulgence whilst waiting for the plaintiff to renew the bank guarantee. Despite having given such assurance the defendant proceeded to make a demand even after the bank guarantee was extended to 5 January 2019. The plaintiff had no notice of the deadline of 28 November 2017 for the renewed bank guarantee to be procured as they were not given a copy of the letter to MBB nor were they notified by the defendant. The defendant on 27 December 2017 had written to MBB complaining that the renewed bank guarantee did not comply with the requirements of the defendant as it was not on the same terms as the first bank guarantee. This letter was, however, also not copied to the plaintiff.

[33] The defendant had made the demand after the plaintiff had extended the bank guarantee clearly illustrates the lack of bona fide on the part of the defendant. The call on the bank guarantee when the defendant had given indulgence to the plaintiff can be construed as unconscionable. We are of the view that any discussions or negotiations on the terms of the bank guarantee should necessarily involves the plaintiff. The lack of notice to the plaintiff calls into question the conduct and the conscionability of the call by the defendant.

[34] Clause 3 of the bank guarantee stipulates:

> ... all demands, if any, in respect of this Guarantee have to be made and received by us *not later than thirty (30) days after the Expiry Date*, failing which, this Guarantee

shall lapse and cease to have any effect whatsoever and the Guarantee shall be deemed to be discharged and released ... (Emphasis added.)

[35] We find ourselves in agreement with learned counsel for the plaintiff's submission that the demand by the defendant on 29 January 2018 was made more than 30 days after the date of expiry of the bank guarantee. The demand, if any, have to be made at the earliest on 7 December 2018 or at the latest on 5 January 2018. The demand made by the defendant was on 29 January 2018 under the original bank guarantee was well outside the expiry of the guarantee which had lapsed on 6 December 2017. The first bank guarantee had lapsed when the call was made on 29 January 2018 and as such the sum guaranteed ought not to have been paid out to the defendant.

[36] The learned High Court judge erred in failing to consider the existence of the extended bank guarantee and the material facts relating to the call on the bank guarantee. There are serious issues to be tried and the balance of convenience lies in favour of granting the reliefs sought.

CONCLUSION

[37] After perusing the records of appeal and after considering the submissions from all parties, we had allowed the appeal. The order of the High Court was set aside. We granted order in terms of prayers 1 and 2 of the OS pending the arbitration and that the monies received by the respondent under the bank guarantee be remitted to MBB within 14 working days from the date of this order. We ordered costs of RM5,000 subject to the payment of allocator. We further ordered that the deposit be refunded to the appellant.

Appeal allowed with RM5,000 costs subject to payment of allocator.

Reported by Izzat Fauzan